

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Remanded February 26, 2007

VANORY ASKEW v. STATE OF TENNESSEE, KEVIN MYERS, WARDEN

**Appeal from the Circuit Court for Wayne County
No. 13617 Robert L. Jones, Judge**

No. M2007-00414-CCA-RM-HC - Filed April 11, 2007

The Petitioner, Vanory Askew, pled guilty to intent to sell or deliver 300 grams or more of cocaine, and one count of possession of a deadly weapon with intent to employ it in the commission of an offense, and he was sentenced to eighteen years. Subsequently, the Petitioner pled guilty to possession of cocaine in an amount under .5 grams and was sentenced to four years in the Department of Correction to be served concurrently with his previous sentence. The Petitioner filed a petition for a writ of habeas corpus, alleging that: (1) the trial court erred by summarily dismissing the his pro se petition for writ of habeas corpus and denying his request for the appointment of counsel; and (2) the concurrent sentence he received for his 2003 conviction was illegal, because he was on parole at the time of the offense. The trial court dismissed the petition, and we reversed the judgment of the trial court, and remanded the case for the appointment of counsel. The State filed an application to appeal the case to the Tennessee Supreme Court. The Supreme Court granted the application for the purpose of remanding the case for our reconsideration in light of that Court's recent opinion in Charles G. Summers v. State, No. M2004-02806-SC-R11-HC, –S.W.3d–, 2007 WL 160955 (Tenn. Jan. 23, 2007). On remand, we affirm the trial court's dismissal of the petitioner's habeas corpus petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT JR., JJ., joined.

Lindsay C. Barrett, Dickson, Tennessee, for the Petitioner, Vanory Askew.

Robert E. Cooper Jr., Attorney General and Reporter; Elizabeth B. Marney and Michael Markham, Assistant Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts and Procedural History

On November 7, 1994, the Petitioner pled guilty to one count of possession with intent to sell

or deliver 300 grams or more of cocaine and one count of possession of a deadly weapon with intent to employ it in the commission of an offense. The trial court sentenced the Petitioner as a standard Range I offender, to eighteen years in the Tennessee Department of Correction.

On July 17, 2003, the Petitioner pled guilty to possession of cocaine in an amount under .5 grams, and he was sentenced to four years in the Department of Correction to be served concurrently with his previous sentence.

The Petitioner filed a petition for writ of habeas corpus on September 30, 2004. In that petition, the petitioner alleged, in part, that his sentence was illegal. The petition included the judgments of conviction showing that the Petitioner had been sentenced to concurrent sentences and that he was on parole when the concurrent sentences were ordered. The petition did not, however, include a copy of the guilty plea hearing. The trial court granted the State's motion to dismiss the petition on November 23, 2004. The Petitioner appealed that judgment to this Court, and we reversed and remanded the case for appointment of counsel.

The State appealed the decision of this Court to the Tennessee Supreme Court, and the Tennessee Supreme Court remanded the case back to this Court for reconsideration in light of their recent opinion in Summers v. State, –S.W.3d–, 2007 WL 160955 (Tenn. Jan. 23, 2007).

II. Analysis

On appeal, the Petitioner asserted that he should have been appointed counsel and that his concurrent sentences were illegal. By order of the Supreme Court, we again address those two issues. Article I, Section 15 of the Tennessee Constitution guarantees its citizens the right to seek habeas corpus relief. In Tennessee, a “person imprisoned or restrained of [his or her] liberty, under any pretense whatsoever . . . may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment . . .” Tenn. Code Ann. § 29-21-101 (2000). Although no statute of limitations exists for filing a habeas corpus petition, the grounds upon which habeas corpus relief will be granted are very narrow. See Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004). “Unlike the post-conviction petition, the purpose of a habeas corpus petition is to contest void and not merely voidable judgments.” Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). Therefore, in order to state a cognizable claim for habeas corpus relief, the petition must contest a void judgment. Id. “A void judgment is one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment A voidable judgment is one which is facially valid and requires proof beyond the face of the record or judgment to demonstrate its voidableness.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998) (citing Archer v. State, 851 S.W.2d 157, 161 (Tenn. 1993)). Thus, a writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant, or that the sentence of imprisonment or other restraint has expired. Archer, 851 S.W.2d at 164; Potts, 833 S.W.2d at 62.

The petitioner bears the burden of showing by a preponderance of the evidence that the

conviction is void or that the prison term has expired. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in* State v. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998), *no perm. app. filed*. Furthermore, the procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Archer, 851 S.W.2d at 165. It is permissible for a trial court to summarily dismiss a petition for habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. See Passarella, 891 S.W.2d at 627; Buford v. State, No. M1999-00487-CCA-R3-PC, 2000 WL 1131867, at *2 (Tenn. Crim. App., at Nashville, July 28, 2000), *perm. app. denied* (Jan. 16, 2001). Further, “[a] trial court may properly choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” Summers, –S.W.3d–, 2007 WL 160955, at *7. Because the determination of whether habeas corpus relief should be granted is a question of law, our review is de novo with no presumption of correctness. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000).

The Petitioner in this case has contended that he was sentenced to concurrent sentences in direct contravention of Tennessee Code Annotated section 39-16-605(c) and Tennessee Rule of Criminal Procedure 32(c)(3)(B). The Supreme Court has recently noted that the provisions of Rule 32(c)(3) incorporate various statutory provisions mandating consecutive sentencing. Summers, –S.W.3d–, 2007 WL 160955, at *2. As pertinent to the case herein, Tennessee Rule of Criminal Procedure section 32(c)(3) (2003) provides that, “where a defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: (A) To a sentence for a felony committed while on parole for a felony”

A petitioner may be entitled to withdraw a guilty plea that includes an illegal concurrent sentence. Summers, –S.W.3d–, 2007 WL 160955, at *5 (citations omitted). A court lacks jurisdiction to impose an agreed sentence that is illegal, even an illegally lenient one. Id. (citing McConnell v. State, 12 S.W.3d 795, 799 (Tenn. 2000)). As a general rule, when a plea agreement includes an illegal sentence, a defendant is entitled to withdraw the guilty plea. Id. (citing McLaney v. Bell, 59 S.W.3d 90, 94-95 (Tenn. 2001)).

In our previous decision in this case, we relied upon McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001), which seemingly stood for the proposition that because the judgments of conviction attached to the Petitioner’s petition for habeas corpus relief indicated that his sentences contravened a statute, making them void and illegal, he, as a pro se Petitioner, should be appointed counsel. The counsel could then assist him in filing a habeas corpus petition and assist the trial court in determining whether the sentences were, in fact, illegal. In Summers, the Tennessee Supreme Court recently clarified its decision in McLaney, stating:

McLaney has been read to dictate that whenever a pro se petitioner fails to attach to his habeas corpus petition pertinent documents from the record of the underlying

proceedings, he must be afforded the opportunity with the assistance of counsel, to cure any deficiency in his filings. This reading of McLaney is inconsistent with applicable statutes and prior decisions permitting summary dismissal, without the appointment of counsel, unless the alleged illegality is apparent from the pro se petition and the documents attached thereto.

Summers, –S.W.3d–, 2007 WL 160955, at *6 (footnotes omitted).

Relying upon Summers, we must now turn to decide whether the Petitioner in this case is entitled to the appointment of counsel. The appointment of counsel in a habeas corpus proceeding is discretionary. Tennessee Code Annotated section 40-14-204 (2003) provides that “[i]n all proceedings for the writ of habeas corpus . . . , the court having jurisdiction of such matters shall determine the question of indigency and appoint counsel, *if necessary*, in the manner set out in this part.” (Emphasis added). Furthermore, there is no constitutional right to counsel in habeas corpus proceedings. Summers –S.W.3d–, 2007 WL 160955, at *7. Rule 13 of the Rules of the Tennessee Supreme Court also provides that an indigent petitioner in a habeas corpus proceeding may have appointed counsel. Tenn. Sup. Ct. R. 13 § 1(d)(1)(C). In Summers, the Court clarified that “Rule 13 does not create rights; it merely contains the procedural mechanism for implementing them.” Id. The appointment of counsel is not “necessary” within the meaning of Tennessee Code Annotated section 40-14-204 simply because a petitioner states a cognizable claim for habeas corpus relief. Summers, –S.W.3d–, 2007 WL 160955, at *8. Habeas corpus procedures are mandatory and strictly applied, and the proof in such an action is limited to the face of the judgment and the record of the underlying conviction. Archer, 851, S.W.2d at 164.

The Summers Court has stated:

A trial court is vested with the discretion to determine whether appointment of counsel is necessary within the meaning of Tennessee Code Annotated section 40-14-204. The petitioner bears the burden of proving an adequate record for summary review of the habeas corpus petition, including consideration of whether counsel should be appointed. In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing. Any broader interpretation of when the appointment of counsel is necessary would be inconsistent with the narrow scope of habeas corpus relief and the strict technical requirements for seeking such relief.

Summers, –S.W.3d–, 2007 WL 160955, at *8.

The judgments attached to the Petitioner’s petition for habeas corpus relief show that he pled

guilty to possession with intent to deliver or sell over 300 grams of cocaine on November 7, 1994. He was ordered to serve eighteen years. Subsequently, on July 17, 2003, the Petitioner pled guilty to possession of under .5 grams of cocaine. He was sentenced as a Multiple offender to four years. The judgment indicates that the sentence was to run “concurrent with TDOC sentence.” While the judgment in the Petitioner’s possession of under .5 grams of cocaine conviction indicates that his sentence should run concurrently with his TDOC sentence, it does not indicate that the Petitioner committed this crime while on parole. We conclude, therefore, that no illegality of the sentence is evident on the face of the judgment ordering a concurrent sentence for the possession conviction. Furthermore, nothing in the record indicates that the Petitioner was on parole at the time of this offense. It seems logically deduced that because he was sentenced to eighteen years he was likely on parole, but this fact was not demonstrated in the attachments to the petition. Additionally, the Petitioner failed to provide documents from the underlying guilty plea proceedings. Accordingly, we conclude that summary dismissal was proper.

II. Conclusion

In accordance with the foregoing authorities and reasoning, we conclude that the trial court properly dismissed the Petitioner’s habeas corpus petition.

ROBERT W. WEDEMEYER, JUDGE